A

KESATUAN PEKERJA-PEKERJA KELAB, SEMENANJUNG MALAYSIA

v.

B

KELAB LUMBA KUDA PERAK

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF FCJ
HASHIM YUSOFF FCJ
AZMEL MAAMOR FCJ
C [CIVIL APPEAL NO: 01-328-2006 (W)]
31 OCTOBER 2007

LABOUR LAW: *Trade union - Recognition - Judicial review of Minister's decision to accord recognition - Membership verification exercise*
D *- Whether fundamentally flawed due to exclusion of temporary employees in arriving at percentage - Whether order of certiorari should have been allowed*

ADMINISTRATIVE LAW: *Remedies - Judicial review - Trade union recognition - Judicial review of Minister's decision to accord recognition -*
E *Membership verification exercise - Whether fundamentally flawed due to exclusion of temporary employees in arriving at percentage - Whether order of certiorari should have been allowed*

F The appellant had sought recognition from the respondent in respect of employees of the respondent who had become members of the appellant. The Director General of Industrial Relations ('DGIR') requested the Director General of Trade Unions ('DGTU') to ascertain membership of the appellant as at the date of the claim for recognition *ie*, 12 August 1996. The respondent
G was required to submit particulars of its employees and, at first, the respondent submitted a list containing 88 permanent employees. The respondent then submitted a second list including the names of its temporary and casual employees, as they formed an integral part of the operations. Despite the respondent's
H request for a secret ballot as the preferred method of verification, it was the membership verification exercise that was used. Subsequently, the respondent was informed by the DGIR that 72.41% of its employees were within the scope of representation of the appellant. The respondent expressed doubt and, as such,
I did not accord recognition to the appellant. In view of this, the DGIR directed the DGTU to conduct a membership exercise again in order to re-ascertain the percentage of membership. The

DGTU, however, did not comply with the directive but retained his earlier results which were premised on the 88 permanent employees of the respondent. The DGTU excluded the temporary employees from the verification exercise. The Minister of Human Resources ('Minister') subsequently informed the respondent of his decision to order it to accord recognition to the appellant. Being dissatisfied, the respondent applied to the High Court for a judicial review of the Minister's decision and, upon the High Court's dismissal of the respondent's application, appealed to the Court of Appeal. The Court of Appeal ruled that the temporary employees of the respondent must be included in the verification exercise because they were employees within the meaning of s. 2 of the Industrial Relations Act 1967 ('IRA') and s. 2 of the Trade Unions Act 1959. The Court of Appeal regarded it as a condition precedent for the Minister to ascertain the number and categories of workmen within the scope of a representation of the appellant before determining the issue of whether to accord recognition. The appellant was granted leave to appeal on the following questions of law: (i) whether an employer possesses a legitimate expectation in law that a secret ballot (as opposed to a membership verification exercise) would be held when the DGTU decides on the mode of verification to determine the membership status of a trade union; and (ii) whether the Minister is required in law to give reasons when making an order of recognition of a trade union under s. 9(5) of the IRA, especially in view of the ouster in s. 9(6) of the IRA.

Held (dismissing the appeal)
Per Azmel Maamor FCJ delivering the judgment of the court:

(1) It was an undisputed fact that the temporary employees had been excluded in the membership verification exercise. Despite the insistence by the respondent, the DGTU refused to include the temporary employees in the exercise to ascertain the percentage of membership. The DGTU's decision to exclude the temporary employees was accepted by the DGIR. In making his decision to order the respondent to accord recognition to the appellant, the Minister relied on the decisions of the DGIR and DGTU. It was very obvious that the very basis of the membership exercise had been fundamentally flawed by the exclusion of the temporary employees in arriving at the percentage. Needless to say, the result of the membership exercise was invalid and should not

have been relied upon by the Minister. On the basis of this fundamental flaw, the order of *certiorari* should be allowed. Therefore, the ruling made by the Court of Appeal was correct. Having regard to the fact that the membership exercise had been erroneously conducted, it would be a futile exercise to decide on the questions of law posed and this court, thus, refused to answer them. (paras 13 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memohon pengiktirafan dari responden berhubung pekerja-pekerja responden yang menjadi ahli-ahli perayu. Sehubungan itu, Ketua Pengarah Perhubungan Perusahaan ('DGIR') telah meminta Ketua Pengarah Kesatuan Sekerja ('DGTU') menentukan keahlian perayu setakat tarikh tuntutan pengiktirafan, iaitu 12 Ogos 1996. Berikutnya, responden diminta mengemukakan butir-butir mengenai pekerja-pekerjanya di mana responden pada mulanya mengemukakan nama 88 pekerja tetapnya. Responden kemudian mengemukakan senarai kedua yang termasuk pekerja-pekerja sementara dan harian, kerana mereka juga merupakan sebahagian dari operasinya. Walaupun, bagi tujuan pengesahan, responden lebih mengutamakan dan meminta pengundian sulit diadakan, yang dilaksanakan adalah kaedah pemeriksaan keahlian. Berikutnya, responden diberitahu oleh DGIR bahawa 72.41% dari pekerja-pekerjanya berada di dalam skop representasi perayu. Responden sangsi dengan keputusan itu dan dengan itu tidak memberikan pengiktirafan kepada perayu. Atas keadaan ini, DGIR mengarahkan DGTU untuk melakukan pemeriksaan keahlian sekali lagi bagi memastikan peratus keahlian. DGIR, bagaimanapun, tidak mematuhi arahan sekaligus berpegang kepada keputusan awalnya yang dibuat berdasarkan kepada 88 pekerja tetap responden. DGTU mengenepikan pekerja-pekerja sementara dari pemeriksaan keahlian. Berikutan itu, Menteri Sumber Manusia ('Menteri') memberitahu responden keputusannya mengarahkan responden supaya memberi pengiktirafan kepada perayu. Merasa tidak puashati, responden memohon ke Mahkamah Tinggi untuk semakan kehakiman terhadap keputusan, dan, ekoran penolakan permohonannya oleh Mahkamah Tinggi, merayu ke Mahkamah Rayuan. Mahkamah Rayuan memutuskan bahawa pekerja-pekerja sementara responden hendaklah dimasukkan di dalam pemeriksaan keahlian kerana mereka adalah pekerja di dalam maksud s. 2 Akta Perhubungan Perusahaan 1967 ('IRA') serta s. 2 Akta Kesatuan Sekerja 1959. Mahkamah Rayuan menganggapnya sebagai satu syarat duluan bahawa Menteri hendaklah menentukan jumlah dan

kategori pekerja yang berada di dalam skop representasi perayu sebelum menentukan isu sama ada untuk memberikan pengiktirafan. Perayu telah diberi izin untuk merayu atas persoalan undang-undang berikut: (i) sama ada seorang majikan mempunyai harapan sah di sisi undang-undang bahawa satu pengundian rahsia (bertentangan dengan kaedah pemeriksaan keahlian) akan diadakan bilamana DGTU memutuskan mengenai kaedah pemeriksaan bagi menentukan status keahlian sebuah kesatuan sekerja; dan (ii) sama ada Menteri berkewajipan di sisi undang-undang untuk memberi sebab apabila memerintahkan pengiktirafan sesebuah kesatuan sekerja di bawah s. 9(5) IRA, terutama mengambilkira kewujudan fasal penyingkiran di s. 9(6) IRA.

Diputuskan (menolak rayuan)
Oleh Azmel Maamor HMP menyampaikan penghakiman mahkamah:

(1) Adalah satu fakta yang tidak dipertikaikan bahawa pekerja-pekerja sementara telah diketepikan di dalam pemeriksaan keahlian yang dijalankan. Walaupun didesak oleh responden, DGTU menolak untuk memasukkan pekerja-pekerja sementara di dalam pemeriksaan bagi menentukan peratus keahlian. Keputusan DGTU untuk mengenepikan pekerja sementara telah diterima oleh DGIR. Dalam membuat keputusan memerintahkan responden untuk memberi pengiktirafan kepada perayu, Menteri bergantung kepada keputusan-keputusan DGIR dan juga DGTU. Adalah jelas bahawa asas pemeriksaan keahlian adalah cacat dengan secara fundamental ekoran pengenepian pekerja-pekerja sementara dalam mengira peratus. Tidak perlu ditekankan bahawa keputusan pemeriksaan keahlian adalah tak sah dan Menteri tidak boleh bergantung kepadanya. Berdasarkan kecacatan fundamental ini, maka perintah *certiorari* harus dibenarkan. Oleh itu, dapatan yang dibuat oleh Mahkamah Rayuan adalah betul. Mengambilkira bahawa pemeriksaan keahlian telah dilaksanakan secara salah, ianya adalah sia-sia untuk membuat keputusan atas persoalan undang-undang yang dikemukakan. Oleh itu, mahkamah ini menolak untuk menjawabnya.

Legislation referred to:
Industrial Relations Act 1967, s. 2
Trade Unions Act 1959, s. 2

For the appellant - B Lobo; M/s Lobo & Assoc
For the respondent - N Sivabalah (Suganthi Singam with him); M/s Shearn Delamore & Co

[Appeal from Court of Appeal, Civil Appeal No: W-01-61-2001]

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor FCJ:

[1] This court had, on 26 September 2005, granted leave to the appellant to appeal to the Federal Court on the following questions of law for consideration in the appeal:

(i) Whether an employer possesses a legitimate expectation in law that a secret ballot (as opposed to a membership verification exercise) would be held when the Director General of the Trade Unions decides on the mode of verification to determine the membership status of a trade union.

(ii) Whether the Y.B. Minister of Human Resources is required in law to give reasons when making an order of recognition of a trade union under Section 9(5) of the Industrial Relations Act 1967, especially in view of the ouster in Section 9(6) of the said Act.

[2] We heard the appeal on 17 January 2007 and we were unanimous in deciding that the appeal be dismissed with costs. We shall now give our reasons.

[3] The background facts are as follows. On 12 August 1996 the appellant sought recognition from the respondent in respect of employees of the respondent who had become members of the appellant. In the recognition claim, the appellant sought recognition of all employees of the respondent only excluding those in managerial executive, confidential and security positions.

[4] In respect of the exercise, the respondent wrote to the Director General of Industrial Relations (DGIR) that the mode to be taken should be by secret ballot. On the same date, the respondent also informed the appellant that the respondent would not accord recognition if the mode of secret ballot was not undertaken. In October 1996 the DGIR requested the Director General of Trade Unions (DGTU) to ascertain

membership of the appellant as at the date of the claim for recognition ie 12 August 1996. And the respondent was requested to submit particulars of its employees for the purpose of such exercise. A

[5] At first, the respondent submitted a list containing 88 permanent employees. Subsequently, the respondent submitted a second list which included the names of temporary and casual employees of the respondent as they formed an integral part of the operations. B

[6] On 15 January 1997 the DGTU requested both parties to state their choice as to the preferred method of verification of membership ie either by secret ballot or by membership verification exercise. The respondent elected for a secret ballot mode. Despite the respondent's request it was the membership verification exercise that was used. C D

[7] Pursuant to the membership verification exercise, the respondent was informed by the DGIR that 72.41% of its employees were within the scope of representation of the appellant. E

[8] The respondent expressed doubt that 392 of its employees out of a total of 541 employees could have been members of the appellant as at 12 August 1996. As such the respondent did not accord recognition of it. In view of this the DGIR directed the DGTU to conduct a membership exercise again in order to reascertain the percentage of membership. However the DGTU decided not to comply with the directive but to retain his earlier results which were premised on 88 permanent employees of the respondent. The DGTU excluded the temporary employees from the verification exercise. F G

[9] Subsequently on 24 March 2000 the Minister informed the respondent of his decision to order the respondent to accord recognition to the appellant with effect from 12 August 1996. H

[10] Being unsatisfied with the order of the Minister the respondent applied to the High Court for a judicial review against the decision of the Minister. However, the High Court dismissed the respondent's application. Hence the appeal to the Court of Appeal. I

A **Finding Of The Court Of Appeal**

[11] One section of the judgment of the Court of Appeal deals with the subject matter concerning "Illegal Exclusion of Temporary Employees From Scope of Representation of the Second
B Respondent" (the appellant before this court). For a better understanding of the finding of the Court of Appeal on the said subject matter the whole section of the judgment is quoted below:

> **Illegal Exclusion of Temporary Employees From Scope of Representation of the Second Respondent**
>
> C
>
> It is the appellant's contention that the entire recognition proceedings were riddled with fundamental errors in law which renders the order of recognition made by the first respondent defective and susceptible to an order of *certiorari*. Before we
> D examine whether there are errors in law committed by the first respondent to warrant the issuance of an order of *certiorari*, it is crucial for us to appreciate the legal repercussions that ensue from the order of the first respondent ordering the appellant to accord recognition to the second respondent.
>
> E The order of recognition made under section 9 of the Act would result in a trade union contracting on behalf of its members employed by the appellant for new or different terms and conditions of employment. This takes place in the form of collective bargaining. The expression "Collective Bargaining" is defined in section 2 of the said Act as negotiating with a view to
> F the conclusion of a collective agreement; whilst "Collective Agreement" means an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning
> G relations between such parties. This will clearly indicate that once a trade union of employees is accorded recognition, it contracts on behalf of all employees within its scope of representation. The order of recognition would have the effect of taking away the individual rights of non-union members and future employees to contract and to bargain on their terms and conditions of
> H employment. The contracting rights are, therefore, transferred from the employees to the trade union. The Collective Agreement will subsequently bind all employees who fall within the scope of representation of the trade union irrespective of whether they are members or not.
>
> I In ascertaining the status and category of workmen falling within the scope of Union representation it is necessary to examine and reproduce the following relevant statutory provisions:

Section 9(1) of the Act states that no trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

Section 2 of the Act defines a workman as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.

Section 2 of the Trade Unions Act 1959 ("TU Act") defines a "trade union" or "union" as any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be:

(a) within any particular establishment trade, occupation or industry or within any similar trades, occupations or industries; and

(b) **whether temporary or permanent** (emphasis added).

Based on the above mentioned statutory provisions it would be wrong to exclude workmen who do not fall within the four categories above mentioned from the scope of union representation. Clearly, it would be illegal to exclude temporary employees from the scope of representation of the Union. In fact no distinction is made between temporary, casual or permanent employees.

> The second respondent contends that there was no dispute within the meaning of section 9(1A) of the said Act. This is in stark contrast to its actions. In its claim for recognition the second respondent sought recognition for all employees of the appellant. However upon the appellant requesting that a membership check be conducted in respect of all 541 of its employees, the second respondent took the stance that temporary and casual workmen were excluded from the second respondent's scope of representation. It is our view that in light of the fact that the appellant had contended that temporary and casual workmen were to be included in the scope of representation of the second respondents and the union's stance in adopting the opposite view, it is a condition precedent for the first respondent to ascertain the number and categories or workmen within the scope of representation of the second respondent before determining the secondary issue of whether to accord recognition.

[12] In short, what the Court of Appeal had ruled was that the temporary employees of the respondent must be included in the verification exercise because they were employees within the meaning of s. 2 of the Industrial Relations Act 1967 (the Act) and s. 2 of the Trade Unions Act 1959 (TU Act). Based on the provisions of the two Acts there should not be any distinction between permanent and temporary employees. The Court of Appeal regarded it as a condition precedent for the Minister to ascertain the number and categories of workmen within the scope of a representation of the appellant before determining the issue of whether to accord recognition.

Findings Of This Court

[13] It is an undisputed fact that the temporary employees had been excluded in the membership verification exercise. Despite the insistence by the respondent the DGTU refused to include the temporary employees in the exercise to ascertain the percentage of membership. The DGTU's decision to exclude the temporary employees was accepted by the DGIR. In making his decision to order the respondent to accord recognition to the appellant the Minister relied on the decisions of the DGIR and DGTU. In our view it is very obvious that the very basis of the membership exercise had been fundamentally flawed by the exclusion of the temporary employees in arriving at the percentage. Needless to say

the result of the membership exercise was invalid and should not have been relied upon by the Minister. On the basis of this fundamental flaw the order of *certiorari* should be allowed. We therefore agree with the ruling made by the Court of Appeal.

[14] Having regard to the fact that the membership exercise had been erroneously conducted we are of the view that it would be a futile exercise to decide on the questions posed before us. We therefore refuse to answer them. The appeal is dismissed with costs. Deposit is to be given to the respondent to account for taxed costs.

[15] My learned brothers Alauddin bin Dato' Mohd. Sheriff (CJM) and Hashim bin Dato' Hj. Yusoff (FCJ) have seen the judgment in draft and have expressed their agreement with it.